IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 8, 2006

STATE OF TENNESSEE v. RANDY SHUMATE

Direct Appeal from the Circuit Court for Maury County
No. 14986 Stella L. Hargrove, Judge

No. M2005-01764-CCA-R3-CD - Filed September 27, 2006

The appellant, Randy Shumate, pled guilty in the Maury County Circuit Court to one count of rape, and the trial court sentenced him to eight years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's denial of alternative sentencing. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

William C. Barnes, Jr., Columbia, Tennessee, for the appellant, Randy Shumate.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Christi L. Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On November 17, 2004, the Maury County Grand Jury indicted the appellant for the aggravated rape of a thirteen-year-old victim. The offense was committed on November 26, 1993. After the indictment, the appellant was located in Oregon and was brought back to Tennessee for prosecution. On June 21, 2005, the appellant entered a guilty plea to rape. The plea agreement provided that the appellant would receive a sentence of eight years as a Range I standard offender

with the sentence to be served at thirty percent.[1] The trial court was to determine the manner of service of the sentence.

At the sentencing hearing, the State introduced the appellant's presentence report. The report reflected that in 1975, the appellant was convicted of cruelty to animals and received a sentence of four years. The report also reflected that the appellant was convicted in 1979 of "involuntary sexual battery, slight force." The appellant was sentenced to fifteen years for that conviction.

The appellant testified that he was fifty-five years old and had a seventh grade education. He stated that he could read and write, but he had never obtained a general equivalency diploma (GED). The appellant said that he had been married to Patricia Shumate for less than one year, but they had dated for seven years prior to their marriage. Together, they had an eighteen-month-old daughter. The appellant stated that his wife was hospitalized because she had a nervous breakdown. When his wife was not hospitalized, she lived with the appellant's mother. The appellant's mother also took care of the appellant's daughter.

The appellant stated that he grew up in Florida and was living there when he was convicted of involuntary sexual battery. He served less than half of the fifteen-year sentence in confinement after earning sentencing credits. After the appellant's release, he moved to Tennessee for a short time before moving to Ohio. The appellant spent a year in Ohio then returned to Tennessee. Two or three years after his release from the Florida prison, the appellant committed the instant rape in Tennessee. A day or two after the instant offense was committed, the appellant left Tennessee and moved to Louisiana where he lived for a couple of years, working offshore. The appellant then moved to Florida where he was convicted of his third driving under the influence (DUI) offense. After serving his sentence for the DUI, the appellant moved to Oregon.

At the time of his arrest for the instant offense, the appellant was living in Oregon. The appellant said that when he left Tennessee, he had a "lot of charges coming up against me at one time." The appellant said that he stayed away from Tennessee and kept a low profile until the statute of limitations had run on the offenses. The appellant explained:

> Well, it was mostly misdemeanor charges or minor felony charges I was more afraid of than anything else, because once the statute of limitations run out on them, I started paying my taxes just like I was supposed to.
>
> So, I was underneath Randolph Shumate. And any time they wanted to come get me, they could have came and got me, at any time

[1] See Tenn. Code Ann. § 40-35-501(i)(1) and (2) (2003) (providing that an offender committing rape after July 1, 1995, must serve one hundred percent of the sentence in confinement, less no more than fifteen percent sentencing credits).

> after that. So when seven years ran out on the statute of limitations, I was no longer hiding.
>
> . . . .
>
> . . . I did start paying right after I realized the seven years was expired; that if there was any warrants, that they were expired . . . . It was kind of a shock to me when they said I was being charged with rape. And I said, rape? From where?

The appellant stated that he was tracked down by authorities after he applied for a cellular telephone in Oregon. The appellant recalled, "The US Marshall told me at that point that if I hadn't ever applied for that cell phone, they'd never have caught me."

The appellant said that he had not been in any trouble with the law since being convicted of his third DUI conviction in Florida eight years earlier. The appellant stated that after the DUI, he began to straighten out his life. He began dating the woman who would later be his wife and working steadily as a licensed upholsterer. Thereafter, their daughter was born.

The appellant stated that he had been drinking when the rape occurred. He said that he would not do it over again, specifically stating, "I wouldn't have been at the party in the first place." The appellant said that he was sorry for the victim's problems and regretted that the rape had occurred.

The appellant's mother, Evelyn Shumate, testified that she was seventy-three years old. She said that while the appellant was incarcerated, she was taking care of the appellant's wife and daughter. Shumate stated that the appellant's wife was in the hospital, suffering from numerous problems including a nervous breakdown, pancreatitis, and low potassium levels. When the appellant's wife lived with Shumate prior to her hospitalization, she had to be fed by a feeding tube. However, since her hospitalization doctors had discussed removing the wife's feeding tube and bypassing her stomach. Shumate said that she was taking care of all of the family's expenses, relying on $1048 per month in Social Security and the money she earned by working at Kroger for $10 an hour, forty to forty-eight hours a week. She said that because of her age and her health problems, working and taking care of the family was difficult. Further, Shumate said that the appellant's wife's family refused to help her.

Shumate stated that the appellant had "matured" since the rape offense. He had become more responsible and was no longer "fly-by-night." She said that the appellant once had trouble with the law, but he had not been in trouble since he had been married.

At the conclusion of the sentencing hearing, the trial court found that the appellant was not entitled to a presumption in favor of alternative sentencing. The court considered the appellant's lack of remorse, prior criminal history, and the information contained in the presentence report. The

court denied alternative sentencing based upon the need for deterrence and the need to avoid depreciating the seriousness of the offense. On appeal, the appellant contests this ruling.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Initially, we recognize that at the time the instant offense was committed, an appellant was eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003).[2] Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant is a standard Range I offender convicted of a Class B felony; therefore, he is not presumed to be a favorable candidate for alternative sentencing.

However, because the appellant a received sentence of eight years or less, he may still be considered for alternative sentencing. See Tenn. Code Ann. § 40-35-303(a). Under the 1989 Sentencing Act, sentences which involve confinement are to be based on the following considerations contained in Tennessee Code Annotated section 40-35-103(1):

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

[2] In 2005, Tennessee Code Annotated section 40-35-303(a) was amended to provide that an offender is eligible for probation if the sentence imposed is ten years or less. Tenn. Code Ann. § 40-35-303(a) (Supp. 2005). The amendment "shall apply to sentencing for criminal offenses committed on or after June 7, 2005." Id., Compiler's Notes.

> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See Tenn. Code Ann. § 40-35-103(2), (4). Further, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

We note that the appellant failed to cite to any authority in his brief, arguably waiving the issue on appeal.[3] See Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7). Moreover, as we previously observed, one of the considerations in our de novo review is the nature and characteristics of the criminal conduct involved. The appellant failed to include the transcript of the guilty plea hearing in the record for our review. See Tenn. R. App. P. 24(b); see also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). This court has previously cautioned,

> For those defendants who plead guilty, the guilty plea hearing is the equivalent of trial, in that it allows the State the opportunity to present the facts underlying the offense. For this reason, a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed.

State v. Keen, 996 S.W.2d 842, 843 (Tenn. Crim. App. 1999) (citation omitted). Accordingly, the appellant's "failure to include the transcript of the guilty plea hearing in the record prohibits the court's conducting a full *de novo* review of the sentence under [Tennessee Code Annotated section] 40-35-210(b)." State v. Shatha Litisser Jones, No. W2002-02697-CCA-R3-CD, 2003 WL 21644345, at *3 (Tenn. Crim. App. at Jackson, July 14, 2003). In the instant case, the trial court denied alternative sentencing based upon the need for deterrence and the seriousness of the offense, which reasons are fact-specific. Without the guilty plea hearing, we do not have at our disposal all of the facts considered by the trial court. Ordinarily, "[i]n the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Nevertheless, we conclude that the limited record before us supports the trial court's denial of alternative sentencing.

[3] The appellant's brief does not comply with the well-delineated strictures of Rule 27 of the Tennessee Rule of Appellate Procedure; specifically, the brief does not contain a statement of the case nor, as we noted above, does the brief include any cited authority in support of his argument. We caution that through his failure to comply with Rule 27, the appellant has come perilously close to waiving his appellate issues entirely.

At the sentencing hearing, the trial court noted that the appellant lacked remorse for the crime. The court specifically stated:

> It may be [the appellant's] personality, but he certainly demonstrates no real remorse. I know that there has been a time of some over 10, 12 years since this offense occurred, that he has [pled] guilty to. But the Court cannot detect any sign of remorse on the part of [the appellant].
>
> As a matter of fact, I think he sounds kind of cocky, and feels like he's entitled to be released today by this Court. The Court is considering the nature of the offense, that being the rape of a young girl; 13 years old at the time. The Court is considering his prior criminal history, including the prior sexual conviction.

Taking into consideration the appellant's "attitude," the court denied alternative sentencing.

On appeal, the appellant has failed to show that he was suitable for full probation. Accordingly, we conclude that the trial court did not err in denying alternative sentencing.

III. Conclusion

Based on the foregoing, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE